United States Environmental Protection Agency Determination
Review of FAC 62-302.540(5)(d)
Water Quality Standards for Phosphorus
Within the Everglades Protection Area Under Section 303(c) of the Clean Water Act

I. Executive Summary

Pursuant to the March 23, 2005 Court order granting a stay in Miccosukee Tribe of Indians of Florida v. U.S. EPA et al. (S.D. Fla. Lead Case No. 04-21448-CIV-Gold; consolidated with Case No. 04-22072 and Case No. 05-20665), the U.S. Environmental Protection Agency (USEPA) Region 4 reviewed subsections (1), (2), and (5) of the State of Florida's Water Quality Standards for Phosphorus Within the Everglades Protection Area (Phosphorus Rule or Rule) for the purpose of determining whether those sections of the Phosphorus Rule, as adopted by the State of Florida, are new or revised State water quality standards. USEPA concluded in its May 8, 2006 Determination, filed with the Court, that subsections (1), (2), and paragraphs (5)(a)-(c) are not new or revised water quality standards. (AR-Part IX.69). USEPA also concluded that, as adopted by Florida, paragraph (5)(d) of the Phosphorus Rule is a new or revised water quality standard. As discussed below, USEPA has now determined that paragraph (5)(d) is consistent with the requirements of the Clean Water Act (CWA) and is approving paragraph (5)(d) pursuant to section 303(c) of the CWA as a new or revised water quality standard.[1]

II. Background

Over the past eight years, USEPA has issued several determinations concerning the Everglades Forever Act (EFA), amendments to the EFA and the State's Phosphorus Rule. These determinations are included in the Administrative Record. (AR-Part I.C.8,

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1. USEPA has updated the Administrative Record to include additional documents associated with this Determination. The index is attached to this Determination. See AR Part IX.

9, 10, 11, and 12, and Part IX. 69, 70 and 71). Collectively, these determinations provide a detailed history of the Everglades Forever Act and its amendments, the Phosphorus Rule, and a summary of the applicable federal and state statutes and regulations. Most recently, USEPA's May 8, 2006 Determination also provided this history and summary of the applicable law and that document is now included in the Administrative Record. (AR-Part IX.71). Rather than repeat that discussion here, USEPA will reference the previous documents to the extent necessary in setting out the basis for this determination.

III. Review of subsection (5)(d)

In its May 8, 2006 Determination, USEPA concluded that paragraph (5)(d) of the Phosphorus Rule is a new or revised water quality standard. See AR 69 at 1. Thus, pursuant to section 303(c)(2)(A) of the CWA, USEPA is reviewing paragraph (5)(d) for consistency with the CWA and its implementing regulations at 40 C.F.R. Part 131. Consistent with USEPA's regulations at 40 C.F.R. §§ 131.5(a)(3) and 131.6(e), on January 12, 2005, Gregory M. Munson, General Counsel, Florida Department of Environmental Protection (FDEP), certified that Rule 62-302.540, Florida Administrative Code (F.A.C.), establishing water quality standards for phosphorus within the Everglades Protection Area was duly adopted pursuant to state law.[2]

Paragraph (5)(d) of the Phosphorus Rule provides that discharge limits for discharges into the Everglades Protection Area shall be based on technology based effluent limitations established through best available phosphorus reduction technology (BAPRT). Florida's regulations define a "technology based effluent limitation" or "TBEL" as a minimum waste treatment requirement, established by FDEP, based on

2. On June 17, 2004, the Division of Administrative Hearings (DOAH), issued a Final Order finding that the proposed rule, 62-302.540 was a proper exercise of state legislative authority, thus properly adopted under state law. See AR- Part III.35

treatment technology. 62-650.200(13), F.A.C. Florida's statute defines "best available phosphorus reduction technology" (BAPRT) as a combination of best management practices and stormwater treatment areas which includes a continuing research and monitoring program to reduce outflow concentrations of phosphorus so as to achieve the phosphorus criterion in the Everglades Protection Area. Florida Statutes at 373.4592. In its May 5, 2006 letter interpreting subsections (1), (2), and (5) of the Phosphorus Rule, FDEP noted:

> Subsection 5(d) contains permitting provisions and requires the permittee to use the best available phosphorus reduction technology (BAPRT) to achieve compliance with the 10 ppb criterion as soon as practicable. . . . If the permittee is unable to provide reasonable assurance that a TBEL based on BAPRT is sufficient to meet the criterion, then the permit must be accompanied by an appropriate mechanism (such as a moderating provision, variance, compliance schedule etc.) that does not require the permittee to immediately meet an effluent limit based on 10 ppb. [footnote deleted]. Therefore the permitting requirements in subsection 5(d) do not stand in isolation, but are linked to the provisions in subsection (6) of the Phosphorus Rule allowing for moderating provisions and variances, as well as other provisions in Florida law allowing for schedules of compliance.
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> AR Part IX.72.

Consistent with the FDEP's interpretation of this provision, USEPA interprets the language "shall not require WQBELs through 2016" in paragraph (5)(d) to apply in those situations where a moderating provision for a particular permit has been granted pursuant to subsection (6) of the Phosphorus Rule by FDEP and approved by USEPA. Paragraph (5)(d) provides the substance of how a permit limit should be written if the moderating provisions authorized by subsection (6) are applied to a specific permit.

On January 24, 2005, USEPA approved subsection (6) of the Phosphorus Rule. AR Part IX.69. USEPA explained in its January 24, 2005 approval that subsection (6) operates as a variance authorizing provision that will be applied to individual permits on

a case-by-case basis, subject to USEPA review and approval. AR- Part IX.69 at 11, 15. USEPA's regulations specify six factors that may authorize the permanent change or lowering of a designated use. 40 C.F.R. § 131.10(g)(1)-(6). USEPA has, since 1983, interpreted these regulations also to authorize a temporary change to standards, or variances, if the requirements for permanently changing the standards are met. Once the designated use is changed, criteria that protect the new use may be adopted. 63 Fed. Reg. 36,742, 36,759 (July 7, 1998). AR Part I.A.5. States often promulgate regulations broadly authorizing the process for applying for variances without applying the variance to a particular discharger. USEPA typically calls these types of provisions "authorizing provisions." When a state adopts an authorizing provision, USEPA would review and approve the authorizing provision as a new or revised water quality standard and then USEPA subsequently would review and approve each application of the provision to a particular discharger as a new or revised water quality standard. 48 Fed Reg. 51,400, 51,403 col.3. (Nov 1983). AR-Part I.A.2. This approach equates to a two-step approval process; first reviewing and approving the authorizing provision and then reviewing and acting on the specific application of that provision on a case-by-case basis. These two steps do not generally happen contemporaneously.

USEPA described its reasons for approving the variance authorizing provision in its January 24, 2005 decision and record for the decision. AR-Part IX.69. As stated in that decision, USEPA reviews a variance authorizing provision to determine whether it is consistent with the substantive and relevant requirements of 40 CFR § 131.10, including the conditions for removing a designated use under 40 C.F.R. § 131.10(g). AR-Part IX.69 at 13, 15. Because the moderating provisions in the Phosphorus Rule allow for a temporary change in the phosphorus criterion where there is a net improvement (in

impacted areas) or hydropattern restoration resulting in environmental benefits outweighing potential adverse impacts (in unimpacted areas), and because the moderating provisions require application of the best available phosphorus reduction technology during the period of the variance, USEPA determined that subsection (6) could be applied in a manner consistent with the requirements of 40 C.F.R. § 131.10(g)(1)-(6). *Id.* Because the BAPRT as called for under the Long Term Plan is intended to reflect the best technology and an iterative approach to identifying such technology that is appropriate given the large scale of this restoration effort and the unknowns associated with some of the technologies being employed to achieve the numeric criterion for phosphorus, application of BAPRT in a specific water under the conditions specified in subsection 6 may also be consistent with one of the six factors at 40 C.F.R. § 131.10(g)(1)-(6) that would justify a variance. This approach is also consistent with the intent of variances which is to provide a mechanism to adopt a modified standard where discharger compliance with the underlying water quality standard is "demonstrated to be infeasible" and the variance "secures the highest level of water quality attainable short of achieving" the underlying standard. AR-Part I.5 at 36759.

USEPA also considered that subsection (6) was not self implementing, but was only the first step in a two step process whereby FDEP would submit each application of subsection (6) as a change to water quality standards subject to USEPA approval. USEPA would evaluate the application of section (6) to determine whether the specific facts of the situation meets one of the factors specified by 40 C.F.R. § 131.10(g). USEPA stated that the "specific facts of a particular variance are best addressed [and can only be addressed] at the time the variance is issued." AR-Part IX.69 at 14. Because the facts supporting a variance authorized pursuant to subsection 6 could also be consistent

with the § 131.10(g) factors, and would be subject to USEPA's subsequent approval to ensure that the situation meets one of the bases for granting a variance, USEPA found subsection (6) consistent with 40 C.F.R. Part 131. In other words, it is possible that in applying the variance authorizing provision on a case-by case basis, looking to the particular facts of that situation, one or more of the six regulatory bases for revising a use could apply. It is possible that USEPA would approve the variance in some cases and disapprove it in others. Because the authorizing provisions contemplated situations that could be consistent with one or more of the bases for changing water quality standards, and because USEPA would review each application of the moderating provisions to ensure consistency with 40 C.F.R. §131.10(g), USEPA approved subsection (6) as a general procedure authorizing variances. AR-Part IX.69.

As stated above, paragraph (5)(d) of the Phosphorus Rule prescribes substantively how permits would be written when a moderating provision is implemented pursuant to subsection (6). Subsection (6) requires that the permittee will implement BAPRT with the goal of achieving the numeric phosphorus criterion. 62-302-540(6)(a)1.a. and (2), F.A.C.; 62-302-540(6)(b), F.A.C. Paragraph (5)(d) states that the interim limits in permits shall be TBELs based on BAPRT. This requirement is consistent with subsection (6) of the Rule, which states that BAPRT "shall use an adaptive management approach based on the best available information and data to develop and implement incremental phosphorus reduction measures with the goal of achieving the phosphorus criterion" and "shall also include projects and strategies to accelerate restoration of natural conditions with regard to populations of native flora and fauna." These conditions would become part of the NPDES permit, and provide the basis for setting the interim levels of the discharge.

USEPA has stated that it is important that "a variance identif[y] and justif[y] the numerical criteria that will apply during the existence of the variance." 63 Fed. Reg. 36, 742, 36,759 col. 1 (July 7, 1998). USEPA finds that paragraph (5)(d) accomplishes this. During the permitting process, the State will identify a specific TBEL or effluent limitation that must be achieved during the variance period. As noted in the State's May 5, 2006 letter:

> Subsection 5(d) contains permitting provisions and requires the permittee to use the best available phosphorus reduction technology (BAPRT) to achieve compliance with the 10 ppb criterion as soon as practicable. . . . Initial discharge limits for these permits will be Technology -Based Effluent Limitations("TBELS") based upon BAPRT.[3]

USEPA finds that, where a variance is appropriate, TBELs based on BAPRT will result in the best possible progress toward restoring the Everglades during the period of the variance

Paragraph (5)(d) implements subsection (6) in a manner consistent with USEPA's regulations at 40 C.F.R. § 131.10. Therefore, USEPA approves paragraph (5)(d) as a water quality standard.

5/31/06

Date

J. Scott Gilley

for James D. Giattina, Director
Water Management Division

3. FDEP has issued NPDES permits for the Stormwater Treatment Areas using the TBEL approach. Most recently, the STA-1E permit, issued on August 30, 2005, sets an initial TBEL and requires that the TBEL be revised consistent with the iterative approach of BAPRT until such time as the TBEL can achieve compliance with the WQBEL. AR-Part IX.72, 73, and 74.